Supreme Court, U.S.
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No. 97-322

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

KAREN F. ALEXANDER
Petitioner,

- against -

CHRISTINE TODD WHITMAN; et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI

BRIEF AMICUS CURIAE OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA - NEW JERSEY IN SUPPORT OF THE PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS

This Amicus Brief is submitted by the Association of Trial Lawyers of America - New Jersey by consent of the parties: ATLA-NJ submitted an Amici Brief below in the U.S. Court of Appeals for the Third Circuit.

"The Association of Trial Lawyers of America - New Jersey" (ATLA-NJ) maintains its principal office at 150 West State Street in Trenton, New Jersey. ATLA-NJ is affiliated with, and is a branch of, the national organization of the "Association of Trial Lawyers of America", founded in 1946, which has its principal office in Washington, D.C. ATLA-NJ has 2,400 attorneys as members. ATLA has 60,000 members nationwide.

ATLA-NJ provides comprehensive continuing legal education and litigation technique seminars for all members of the New Jersey Bar. As part of its purpose ATLA-NJ promulgates changes and trends in the law and advocates on behalf of its members and their clients. The substantive rights of the clients of its members are of significant importance to ATLA-NJ and its role in advocating the rights of these clients. Legal issues and cases before the Courts, which impact on those rights are of important concern to the organization and its members. This particular case presents important questions of law which impacts on the practice of its members and the rights of the clients of the members.[1]

SUMMARY OF ARGUMENT

As it relates to the Equal Protection Rights of Karen Alexander, a mother whose baby daughter was tortiously killed by a negligent third party, the opinion of the United States Court of Appeals directly conflicts with the decisions of this Court in such a manner that it effectively overrules the decisions of this Court.

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[1]The submission of this Amicus Curiae Brief on behalf of ATLA-NJ is made upon a unanimous vote of its Board of Directors. Pursuant to Rule 37.6. Counsel for ATLA-NJ worked in consultation with counsel for the Petitioners and the counsel for Petitioner assisted in authoring the Brief. Monetary conribution for the cost of printing was made by Damon Keeley, a resident of New Jersey who is not a member of ATLA-NJ.

Among its fundamental errors the Court of Appeals' decision conflicts with the decision of this Court in four ways: 1] it expressly stated that the similarity of circumstances of those who enjoyed the benefits of New Jersey's wrongful death statute and those who do not is irrelevant for purposes of Equal Protection analysis - an erroneous statement that contradicts the clearly articulated law of this Court; 2] in direct defiance of this Court's decision in *Glona v. American Guaranty Liability and Insurance Co.*, 391 U.S. 73, 75, 76 (1968), the Court of Appeals held that the creation of a legal class of persons created by the statute is the controlling element when applying the Equal protection Clause, not the factual reality of the people it is designed to protect; 3] the Court of Appeals held, in effect, that a state need not have any interest advanced by the classification as it relates to the purpose of the law, a holding in conflict with this Court's controlling decisions; and 4] the Court of Appeals ignored the decisions of this Court, including *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) which holds that in instances where a state creates a cause of action which is designed to protect the fundamental interests of individuals within its territory, a classification excluding some persons from that protection must be subjected to strict scrutiny. Certiorari should be granted.

ARGUMENT

POINT I: THE OPINION OF THE UNITED STATES COURT OF APPEALS IN THIS CASE, AS IT RELATES TO THE EQUAL PROTECTION RIGHTS OF KAREN ALEXANDER, SO CONFLICTS WITH THE CONTROLLING DECISIONS OF THIS COURT, AND SO IGNORES SOME OF THE MOST BASIC TENETS OF EQUAL PROTECTION JURISPRUDENCE, THUS EFFECTIVELY OVERRULING THE DECISIONS OF THIS COURT, THAT IT COMPELS A GRANT OF CERTIORARI

The Opinion of the United States Court of Appeals, reported at 14 F.3d 1392, as is relates to Mrs. Alexander's personal equal protection rights, directly conflicts with the decisions of this Court in such a manner that it not only leaves the people of the State of New Jersey with laws which violate the Equal Protection Rights of a segment of its population - an equal protection violation shared with nine other states - but effectively overrules the decisions of this Court. If left without review by this Court it is capable of substantially misleading the bench and bar on important constitutional issues.

The Court of Appeals committed glaring errors, in conflict with the decisions of this Court, in four separate areas of Equal Protection analysis: 1] it expressly stated that the similarity of circumstances of those who enjoyed the benefits of New Jersey's wrongful death statute and those who do not is irrelevant for purposes of Equal Protection analysis - an erroneous statement that contradicts the clearly articulated law of this Court; 2] in direct defiance of this Court's decision in *Glona v. American Guaranty Liability and Insurance Co.*, 391 U.S. 73, 75, 76 (1968), the Court of Appeals held that the creation of a legal class of persons covered by the statute is the controlling elements when applying the Equal protection Clause, not the factual reality of the people it is designed to protect; 3] the Court of Appeals held, in effect, that a state need not have any interest advanced by the classification as it relates to the purpose of the law, a holding in conflict with this Court's controlling decisions; and 4] the Court of Appeals ignored the decisions of this Court, including *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) which holds that in instances where a state creates a wrongful death cause of action which is designed to protect the fundamental interests of

individuals within its territory, a classification excluding some persons from that protection must be subjected to strict scrutiny.

A. The Loss Sustained by Karen Alexander and all Members of Her Class is Identical to the Loss Sustained by Those who Enjoy Benefits Under New Jersey's Wrongful Death Statute. The Holding of the Court of Appeals that the Similarity of the Circumstances of the Members of the Two Classes and the Similarity of the Losses with Respect to the Purpose of the Law was Irrelevant for Equal Protection Jurisprudence, was an Error of Such a Fundamental Nature that it Conflicts with Every Case that this Court has Decided on the Issue.

It has been well established for over seven decades that even where it is appropriate to apply the traditional standard of scrutiny to a state classification that "the classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike". *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). See also *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 572 (1910).

In the context of scrutinization of classifications contained within a wrongful death statute this Court, in *Weber v. Aetna*, 406 U.S. 164, 175 (1972), made it clear that the classification had to bear some relationship, to the recognized purposes of the wrongful death statute, which is intended to compensate for the loss of the relationship as a result of the death of the child.

> "The inferior classifications of illegitimate children bears, in this instance, no significant relationship to those recognized purposes of recovery which (wrongful death portion of) worker's compensation statutes commendably serve". 406 U.S. at 175.

Thus, it is in defiance of this Court's opinion that the Court of Appeals in this case stated that this "similarity" of the circumstances of Mrs. Alexander to those who enjoy benefits

under the statute is irrelevant to Equal Protection jurisprudence. 114 F.3d at 140. In fact, the only thing of relevance is the comparison of the losses sustained by Karen Alexander and the losses sustained by other women who enjoy recovery under the statute.

The relevant circumstances of Karen Alexander with respect to the purpose of the wrongful death statute is absolutely identical to that of the women who are allowed to obtain compensation under the statute because her loss is identical. Both classes of women have lost the lives of the children they carried and lost the relationship and companionship with those children which the statute is designed to compensate. See, *Green v. Bittner*, 424 A.2d 210, 217 (N.J. 1980); *Carey v. Lovett*, 622 A.2d 1279, 1295 (1993). To compare the similarity of circumstances of the two classes it is incumbent upon the Court to compare the loss to the members of the two classes. In this Court's decisions in *Levy v. Louisiana*, 391 U.S. 68 (1868), *Glona v. Amer. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968), and *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) it was made clear that the nature of the loss to the survivors (the mother who lost her child in *Glona*; the children who lost their mothers in *Levy* and *Weber*) defined the similarity of circumstances with respect to the purpose of the wrongful death statute. Whether the mother who sought compensation for the death of her child, like the plaintiff in *Glona*, was married or unmarried at the time her child was born did not affect the nature of her loss if she possessed a relationship with her child, the loss of which was compensated by the statute. The only inquiry relevant to the similarity of circumstances which required the state to treat the two classes in a similar fashion was the factual inquiry of whether she had an actual relationship with her child.

Like the mother in *Glona*, Karen Alexander sustained a loss of her relationship with her daughter Kaylyn which placed her in exactly the identical circumstance as the mothers who are allowed claims under the New Jersey statute. Whereas the marital status of the mother in *Glona* bore no relationship to the loss she sustained, the location of Kaylyn at the moment her death ensued as a result of tortious conduct bears no relationship to the loss of Karen Alexander.

In *Glona* the differences concerning the marital status of the mother's who were denied claims constituted a "difference" not in

the losses the "different" classes sustained, but were merely the identification of facts which defined the classes of mothers themselves. It did not establish a difference in the circumstances of the class as it related to the loss each actually sustained. Likewise, where the death of Kaylyn occurred is only a fact which defines the class of mothers against whom New Jersey discriminates.

To explain the complete arbitrariness of New Jersey's classification and how discriminatory is its statute in denying a claim to Mrs. Alexander it is relevant to understand how utterly identical are the losses of the mothers who are denied a claim when compared to the losses of those who are permitted a claim. First, it is worth noting that it should be self-evident that the life of Kaylyn Alexander and Karen Alexander's interest in her life and the companionship and relationship she had with Kaylyn is totally equal with the life and relationship of any other child, and her mother's interest in her relationship with that child. No characteristic of the child could alter that fact. However, New Jersey's class has nothing whatsoever to do with any characteristic of the child or even age of the child. Every child throughout the entire gestational period is known and recognized under New Jersey law as both a person in fact and a person in law. The child is a human being throughout the entire period of gestation. *Smith v. Brennan*, 157 A.2d 497 (N.J. 1960). If a tortfeasor injures a child in utero, at the very moment of injury the child is recognized as a person in fact and is treated as a person in law. Even if the prenatal injury results in death a wrongful death claim may be successfully brought, because there is a death of a person. A *Portee* claim for emotional distress may be brought because there is the death of a person who is a family member. *Giardina v. Bennett*, 545 A.2d 139 (N.J. 1988), *Carey v. Lovett*, 622 A.2d 1279 (N.J. 1993).

Thus, at the moment a wrongdoer injuries a child in utero there has been an injury to a human being, a person in fact. However, one event may subsequently occur after the injury which under New Jersey law leaves the survivors without a remedy: The parties must wait to see where the death later occurs. If the death is in the womb, the mother is denied a claim because the state creates the fiction that the child never existed and the loss was never sustained. But that fiction is created for the wrongful death claim, not the *Portee* claim which recognized the fact of the loss

regardless of the subsequent irrelevant events concerning where death ensues.

Thus, a child who is but four or five months gestation may be killed and the child's mother has a claim because death was outside the womb, but Mrs. Alexander does not have a claim although Kaylyn was full term. The losses are identical. The similarity of circumstances therefore are identical. Where the child was at the moment of injury is the same. Where the child was when death ensues is irrelevent to every element of the claim, the conduct sought to be deterred and the loss sought to be compensated.

Grave concerns are raised by this classification. First the equal protection violation is evident. This is particularly harmful where the lives of children are involved, and the future happiness of their mothers and their fundamental relationships in life are at stake. But it is particularly alarming where, as in medical malpractice cases such as Mrs. Alexanders, the tortfeasor who causes an injury to a child in utero - potential brain damage perhaps in cases like Kaylyn where her fetal distress goes untreated - are often the very people who are responsible to deliver the child alive. The conflict created where the individual is potentially liable for causing the prenatal injury is counted upon to ensure a live birth - a birth without which that individual can not be held liable - is all too palpable.

B. The Court of Appeals' Holding in this Case that the Legal Classification Created by New Jersey's Wrongful Death Statute is Controlling is in Direct Conflict with this Court's Decision in *Glona v. Amer. Guar. & Liab. Ins. Co.* and Violates the Very Purpose of the Existence of the Equal Protection Clause.

The Court of Appeals in this case held that New Jersey's decision that some persons should not be treated as persons under the law - its decision concerning the creation of a legal class - is controlling, and in effect, the fact that the classification bears no relationship to the purpose of the law is irrelevant. The Third Circuit stated:

> There, (*Giardina v. Bennett*) the New Jersey Supreme Court analyzed that statute and concluded

> that the legislature defined the wrongful death action with the intent of limiting it to the class of people considered persons by the common law . . . Accordingly we find no violation of the Equal Protection Clause. 114 F.3d at 1408.

This statement of the Third Circuit is in direct conflict with the decision of this Court in *Glona v. Amer. Guar. & Liab. Ins. Co., supra*. In *Glona*, the State of Louisiana contended it was free to restrict the definition of person to exclude some human beings from the benefit of its wrongful death statute. Like Louisiana in *Glona*, the State of New Jersey has also created persons from the benefits of the statute, claiming it is free to consider some persons in fact as non-persons in law. This Court expressly stated that such an approach is in direct violation of Equal Protection. The Court of Appeals has completely missed the point of this Court's decision. In *Glona*, a case in which a mother sought to recover compensation under the wrongful death statute for the loss of her child, this Court stated:

> To say that the test of Equal Protection should be the "legal" rather than the biological relation is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of the state to draw such "legal" lines as it chooses. *Glona* at 75, 76.

In *Giardina v. Bennett*, 545 A.2d 139 (N.J. 1988) the New Jersey Supreme Court identified the reason that the class of women whose children suffer a pre-birth death are barred from recovering under the Wrongful Death Statute. The court held that when the cause of action for wrongful death was first created in the nineteenth century (1877) it was not thought that the child was a separate human being and the law reflected the belief at that time that an "unborn child" was

> ...merely a part of his mother without separate existence or personalty. *Smith v. Brennan* 31 N.J. 353, 356 (1960) (discussing common-law treatment of the unborn); see *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 52 Am. Rep. 242 (1884) (wrongful death statute inapplicable to fetus,

> as it was considered to have no existence separate from mother); *Stemmer v. Kline*, 128 N.J.L. 455 (E.&A. 1942) (adopting *Dietrich* analysis in declaring common-law basis for denial of recovery fore prenatal injuries);...It is readily inferable that the legislation adopted this common-law understanding of the concept of a "person" in the adoption of the Wrongful Death Act...*Giardina v. Bennett*, at 143.

This reason for inferring that the child who dies pre-birth was not intended to be included among those person's whose death's are actionable under the statute [that in the nineteenth century it was thought that the child was "merely a part of his mother"] was the very reason why New Jersey's common-law rejected claims for prenatal injuries. *Stemmer v. Kline*, 26 A.2d 684 (N.J. 1942). But in 1960 the New Jersey Supreme Court overruled *Stemmer v. Kline* because the belief that the child "was merely a part of his mother" was a false conclusion of fact and the modern appreciation of the scientific facts required a correction in the law to reflect the reality as it came to be understood. See, *Smith v. Brennan*, 157 A.2d 497, 502-505 (1960).

It is clear from reading *Giardina* and *Smith* together that the only reason New Jersey excludes from the protection of the statute mothers whose children die as a result of tortious conduct where the tortfeasors' acts cause death before birth can occur, is the incorrect understanding held in the nineteenth century that the child was not a separate human being before birth. This is the reason for the classification, and it does not embody an interest of the state which is legitimate to preserve or perpetuate. The whole purpose of *Smith v. Brennan* was to advance the purpose of tort law by having it reflect the true experiences of the people it is designed to protect and benefit. The fiction that Mrs. Alexander did not incur an important loss, which the statute is designed to compensate and protect against, serves no legitimate purpose. It was an imperfect statute when the state did not understand the facts; it is an unconstitutional statute now that the state does understand the facts and there is no reason to perpetuate the original injustice.

To support its construction of the statute *Giardina* also relied upon the fact that, although *Smith* corrected the mistake of fact in the area of prenatal torts, and the legislature recognized

infants who died pre-birth in statutes dealing with gifts, and workers compensation statutes, the failure of the legislation to correct the wrongful death statute is evidence of the legislature's intent to deliberately retain the discriminatory classifications. *Giardina v. Bennett*, 545 A.2d at 143. The fact that the discrimination is intended does not cure a violation of Equal Protection; it only underscores the need for this Court's intervention by protecting the Equal Protection Rights of those in Mr. Alexander's position.

When *Smith v. Brennan* overruled *Stemmer v. Kline* and recognized claims for prenatal injuries in New Jersey for the first time, the New Jersey Supreme Court observed that by recognizing the true scientific facts and creating the claim it was following a trend seen in other states which was driven by the modern appreciation of the scientific facts. See, extensive discussion, *Smith v. Brennan*, 31 N.J. at 356-361.

As a result of that trend, New Jersey is now one of the only ten states which refuses to provide wrongful death claims to mothers whose children are stillborn due to tortious conduct. The other nine are: [1] California, *Justus v. Atchinson*, 565 P.2d 122 (Cal. 1977); [2] Florida, *Stokes v. Liberty Mut. Ins. Co.*, 213 So. 2d 695 (Fla. 1968); *Stern v. Miller*, 348 So. 2d 303 (Fla. 1977); *Hernandez v. Garwood*, 390 So. 2d 357 (Fla. 1980); *Simon v. United States*, 438 F. Supp. 759, 761 (S.D. Fla. 1977) (applying Florida law); [3] Iowa, *McKillip v. Zimmerman*, 191 N.W.2d 706 (Iowa 1971); [4] Maine, *Milton v. Cary Medical Ctr.*, 538 A.2d 252 (Me. 1988); [5] Montana, *Kuhnke v. Fisher*, 683 P.2d 916 (Mont. 1984); [6] Nebraska, *Drabbels v. Skelly Oil Co.*, 50 N.W.2d 229 (Neb. 1951); *Egbert v. Wenzl*, 260 N.W.2d 480 (Neb. 1977); *Smith v. Columbus Community Hosp., Inc.*, 387 N.W.2d 490 (Neb. 1986); [7] New York, *Endresz v. Friedberg*, 248 N.E.2d 901 (N.Y. 1969); [8] Texas, *Witty v. American Gen. Capital Distribs., Inc.*, 727 S.W.2d 503 (Tex. 1987); Virginia, *Lawrence v. Craven Tire Co.*, 169 S.E.2d 440 (Va. 1969).

C. It was Fundamental Error for the United States Court of Appeals to Uphold the Statute Without Identifying a Single Interest of the State Advanced by the Discriminatory Classification

In its determination of the Equal Protection Rights of Karen

Alexander, the United States Court of Appeals upheld the statute despite the fact that it could not identify a single state interest that was advanced by the discriminatory classification. See 114 F.3d at 1406-1408. Clearly the decision of the United States Court of Appeals was in direct conflict with this Court's decisions in *Levy v. Louisiana*, *Glona v. Amer. Guar. & Liab. Ins. Co.*, and *Weber v. Aetna*. In the process the Court of Appeals gratuitously, but quite erroneously, attributed to New Jersey's decision to create the classification the intent to "eliminate the nearly impossible problems of proof inherent in such actions when injury to a fetus is at issue." 114 F.3d at 1406. This gratuitous statement is false in two separate ways: [1] it is contrary to express statements of the New Jersey Supreme Court itself in which the Supreme Court said that there are no difficulties of proof; and [2] it is so illogical in the context of the New Jersey law which permits exactly those identical proofs which are established daily in the New Jersey Courts.

The *Giardina* Court emphasized that it did not reach its interpretation of the statutes based upon any concept that "fetal" injury would pose special problems of proof:

> Our reasons for not adopting a more expansive interpretation of the statutory term "persons" in this context do not relate to the speculative nature of damages that would occur if fetal death qualified as any actionable wrongful death under the act. *Giardina v. Bennett* at 147.

> *Giardina* echoed the principle found in *Smith v. Brennan*: ...the mere difficulty of proving a fact is not a very good reason for blocking all attempts to prove it. *Smith*, 157 A.2d at 503.

The United States Supreme Court has indicated that in Equal Protection cases, like this, difficulty of proofs cannot support an otherwise impermissible classification:

> Problems of proof cannot justify an impenetrable barrier that works to shield otherwise invidious discrimination. *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

> The reason the statute excluded mothers whose children die

before birth was that the legislature acted under a false assumption of fact:

> The Act thus refers specifically to the wrongful death of a "person," to the "person injured," and to the "death of the person injured."...At the time the Act was enacted it was not generally thought that a fetus could be considered a "person," in a legal or juridical sense. This is evidenced by the common law, which treated an unborn child as being "merely a part of his mother without separate existence or personality." *Smith v. Brennan*, 157 A.2d 497, 502-503 (N.J. 1960) (discussing common-law treatment of the unborn); *see Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 52 Am.Rep. 242 (1884) (wrongful death statute inapplicable to fetus, as it was considered to have no existence separate from mother); *Stemmer v. Kline,* 128 N.J. L. 455 (E. & A. 1942) (adopting *Dietrich* analysis in declaring common law basis for denial of recovery for prenatal injuries);...It is readily inferable that the Legislature adopted this common-law understanding of the concept of a "person" in the adoption of the Wrongful Death Act. *Giardina,* at 143.

It is obviously wrong for the Court of Appeals to attribute to New Jersey as a reason for its classification difficulty of proof when the New Jersey Supreme Court has clearly stated that it is *not* the reason. But the New Jersey Supreme Court has articulated, when reading both *Smith v. Brennan*, 157 A.2d 497, 502, 503 (N.J. 1960) and *Giardina v. Bennett* that the entire reason is nothing other than a large mistake of scientific fact which has since been recognized as erroneous.

But there is a much more fundamental reason why the Third Circuit statement about the difficulty of proof (for which the Court can't cite to any New Jersey authority). The truth is that the causal relationship between the negligence of a tortfeasor who causes injury to a child in utero and the death of the child resulting from the tortious act is proven everyday in the New Jersey Courts. The illogical statement of the U.S. Court of Appeals is underscored by the fact that the New Jersey law allows the proofs of the causal relationship and the death even in stillbirth cases, themselves, to prove the *Portee* claim. A necessary element of

proving a Portee claim, whether it is in a live birth or stillbirth case, is the establishment of the causal relationship of the death of the child and the wrongful act of the tortfeasor. So not only has New Jersey expressly stated that the difficulty of proof is not an issue, but it permits those proofs even in stillbirth cases. Even if New Jersey didn't permit *Portee* claims in stillbirth cases, which of course it does, the statement of the U.S. Court of Appeals would remain just as illogical. When a tortfeasor injures a child in utero, such as Kaylyn Alexander, the proof of the causal relationship between the act which caused the original injury and the death itself requires identical proofs regardless of where the death ensues. In fact it is the nature of the proofs of the causal relationship which illustrates the arbitrariness of New Jersey's classification. When we put experts on the stand to express the opinion about the causal relationship there is no discussion about where the death ensued. It is totally irrelevant. The proofs are *exactly identical* in establishing the causal relationship whether the child's death ensues in the womb or outside the womb. The fact that New Jersey allows Karen Alexander to pursue a Portee claim in a stillbirth case, of course, is completely and totally dispositive of the issue, aside from New Jersey Supreme Court's express statements that difficulty of proof is totally irrelevant to the classification.

ATLA-NJ urges this Court to grant Certification. The constitutional rights of people cannot be disposed of on the kind of analysis provided by the United States Court of Appeals in this case. The opinion in *Alexander v. Whitman* provides extremely dangerous precedent that frustrates the rights of large segments of New Jersey's population, but also advances an Equal Protection jurisprudence which defies the holdings of this Court.

Once the identical nature of the proofs is understood the arbitrariness of the classification is clear. The classification in New Jersey's statute constitutes a total denial of the claim to a certain class of women, not a limit on the claim they have. See, *Giardina v. Bennett*, 545 A.2d 139, 143-147 (N.J. 1988). The facts of Mrs. Alexander's circumstances, and that of the members of her class, satisfy all of the elements of the claim. Whether the injured child's death is pre-birth or post-birth bears no relationship to the elements of the claim. The pertinent element concerning death is that there be a causal relationship between the death of the child and the tortious conduct of the defendant. Survival past birth

does not relate to the element of causal relationship. If a child is injured prenatally and dies from a cause unrelated to the injury resulting from the tortious conduct, it is irrelevant whether the child is born alive. Where and when the death occurs is irrelevant to this element of the wrongful death claim. The reference therefore, to where the child's death occurs only serves to define the class of mothers' who are denied the claim. Either the mother enjoys all of the benefits of the claim or she receives none despite the fact the loss to her is the same. The creation of the class is simply an arbitrary determination which excludes some victims who sustain the same loss as those who benefit from the claim. The holding of the United States Court of Appeals only stated that the exclusionary class was created. It did not identify a legitimate basis for it.

D. The Opinion of United States Court of Appeals in this Case is in Direct Conflict with the Opinion of this Court in *Weber v. Aetna*, 406 U.S. 164 (1972) as it Relates to the Standard of Scrutiny of the Classification of Mothers who are Denied Benefits Under the Statute.

The Court of Appeals in this case applied the rational basis standard of scrutiny. 114 F.3d at 406-408. That determination of the Court of Appeals is in direct conflict with *Weber v. Aetna*, 406 U.S. 164 (1972). *Weber v. Aetna* is the controlling decision of this Court as it relates to the exclusion of the class of individuals under the benefits of a wrongful death statute. In *Weber*, the Court clearly applied strict scrutiny because the statute implicated a fundamental personal right and the State had no compelling interest to justify the classification. *Weber*, 406 U.S. at 172-173. The Petition filed in this case set forth an analysis explaining why strict scrutiny is required (see, Petition at p.18 to 23). This analysis is quite consistent with the underlying purposes of New Jersey's wrongful death statutes. The New Jersey Supreme Court has made it clear that the interest that its wrongful death statutes protects is the interest a mother has in her companionship and relationship with her child. *Green v. Bittner*, 424 A.2d 210 (1980), *Carey v. Lovett*, 622 A.2d 1279, 1295 (1993). It is difficult to understand exactly why the Court of Appeals in this case did not apply strict scrutiny standard of review in defiance of *Weber v. Aetna*, a case which was binding

on that Court. The Court of Appeals did not even reference *Weber v. Aetna* or *Levy* or *Glona* in its Equal Protection analysis. These three cases, along with *Parham v. Hughes*, 441 U.S. 347 (1979) sets forth the model for Equal Protection analysis applicable to the wrongful death statutes. Because the Court of Appeals did not address those cases in the Equal Protection context, attempting to understanding its reasoning in refusing to follow *Weber* can be somewhat speculative. However, it is clear that the decision of the United States Court of Appeals is in direct conflict with the *Weber* decision in failing to apply strict scrutiny. Further, it can be inferred that the basis for the error of the Court of Appeals is its misunderstanding of the doctrine of State action. It appears that the Third Circuit thought that there had to be an accompanying due process violation in order for there to be an application of strict scrutiny. The Court dismissed the analysis of the Petitioner (and ignored this Court's holding in *Weber v. Aetna*) by stating:

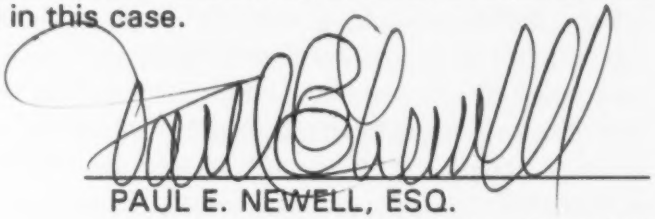
> As discussed earlier, Karen Alexander has not demonstrated how the statutes affect her relationship with her unborn child.

The statute affected her fundamental right by not protecting it when the State chose to protect the fundamental rights of other mothers who sustain the same loss. There can be no question that New Jersey's effort to protect the interests that a mother has in her relationship and companionship with her child, e.g. *Green v. Bittner, supra.*, being the very same interest protected by the Due Process Clause, e.g. *Santosky v. Kraemer*, 455 U.S. 745 (1982) requires that classification be subjected to strict scrutiny as indicated by *Weber*, for the very plain reason that no state can arbitrarily decide to protect the fundamental liberty interests of some persons within its territory, while refusing to protect the same fundamental interests of others, without showing that there is a compelling state interest for such discrimination.

CONCLUSION

The opinion of the United States Court of Appeals in this case, as it relates to the Equal Protection Rights of Karen Alexander, so conflicts with the controlling decision of this Court in *Levy*, *Glona*, *Weber* and *Parham* and has so ignored the basic

tenets of Equal Protection jurisprudence, that the opinion effectively overrules those decisions of this Court and requires that Certiorari be granted in this case.



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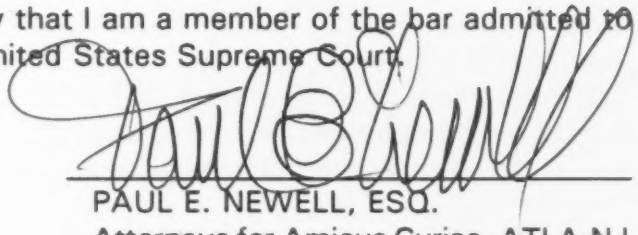
CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar admitted to practice before the United States Supreme Court.



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